

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Mt. Rushmore Broadcasting, Inc.)	
)	
Licensee of Station KRAL(AM))	File Numbers: EB-08-DV-0166
Rawlins, Wyoming)	EB-08-DV-0169
)	
Station KIQZ(FM))	NAL/Acct. No.: 200932800003
Rawlins, Wyoming)	FRN: 0008230559
)	Facility ID No. 46736
Station WHB734)	Facility ID No. 46737
Rawlins, Wyoming)	

ORDER ON REVIEW

Adopted: April 22, 2013

Released: April 25, 2013

By the Commission: Commissioner McDowell not participating.

I. INTRODUCTION

1. In this Order on Review (*Order on Review*), we deny the Application for Review¹ filed by Mt. Rushmore Broadcasting, Inc. (Mt. Rushmore), licensee of Stations KRAL(AM), KIQZ(FM), and WHB734, in Rawlins, Wyoming, pursuant to Section 1.115 of the Commission's Rules (Rules). Mt. Rushmore seeks review of the *Memorandum Opinion and Order (MO&O)* issued by the Enforcement Bureau (Bureau) in this proceeding.² In that *MO&O*, the Bureau denied Mt. Rushmore's Petition for Reconsideration of a \$17,500 forfeiture for failing to ensure the operational readiness of the Station KRAL(AM) and Station KIQZ(FM) Emergency Alert System (EAS) equipment;³ failing to maintain a complete public inspection file for Stations KRAL(AM) and KIQZ(FM);⁴ and failing to operate Station WHB734, an aural studio-transmitter-link (STL), from its licensed location.⁵ For the reasons stated below, we affirm the Bureau's *MO&O*.

II. BACKGROUND

¹ Application for Review, *Mt. Rushmore Broadcasting, Inc.* EB-08-DV-0166, filed October 13, 2011 (Application for Review).

² *Mt. Rushmore Broadcasting, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 12845 (Enf. Bur. 2011), (*MO&O*), *aff'g* *Mt. Rushmore Broadcasting, Inc.*, Forfeiture Order, 25 FCC Rcd 95 (Enf. Bur. Western Region 2010) (*Forfeiture Order*), *aff'g* Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200932800003 (Enf. Bur., Western Region, Denver District Office, rel. December 10, 2008) (*NAL*).

³ 47 C.F.R. § 11.35(a).

⁴ 47 C.F.R. § 73.3526.

⁵ 47 C.F.R. §§ 1.903(a), 1.947(a), 74.532(e).

2. The *Forfeiture Order* and *MO&O* fully stated the facts of this proceeding so we will not repeat them here.⁶ In the *MO&O*,⁷ the Bureau affirmed findings made by the Bureau's Western Region (Region) concerning Mt. Rushmore's violations of the EAS and public inspection file rules, in connection with its operation of Stations KRAL(AM) and KIQZ(FM); and Mt. Rushmore's failure to operate Station WHB734 in accordance with its authorization.⁸ The Bureau found that Mt. Rushmore did not dispute the facts or the violations as detailed in the *NAL* or the *Forfeiture Order*, and that Mt. Rushmore substantially reiterated all of the arguments previously considered and rejected by the Region in its request that the forfeiture be cancelled or substantially reduced. The Bureau found that Mt. Rushmore failed either to demonstrate error or to present new facts or changed circumstances, as required, to compel reconsideration of the *Forfeiture Order*. The Bureau also found that, because Mt. Rushmore had provided no financial documentation of its overall operations to support its repeated request for reduction of the forfeiture amount based on its inability to pay, its request could not be considered.⁹

III. DISCUSSION

3. In this *Order on Review*, we deny Mt. Rushmore's Application for Review and affirm the Bureau's *MO&O*. The forfeiture amount in this case was assessed in accordance with Section 503(b)(2)(E) of the Communications Act of 1934, as amended (Act).¹⁰ That provision states that any person who willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.¹¹ Section 503's legislative history states that the definitions of "willful" and "repeated" recited in Section 312(f) of the Act also apply to Section 503¹² and the Commission has so interpreted the terms.¹³ Thus,

⁶ *Forfeiture Order*, 25 FCC Rcd at 95-96; *MO&O*, 26 FCC Rcd at 12845-12847. According to the Application for Review, both stations went silent on June 21, 2011. See File No. BLSTA-20110713AAI, granted August 10, 2011 (KRAL(AM) 2011 STA Request); File No. BLSTA - 20110713AAJ, granted October 6, 2011 (KIQZ(FM) 2011 STA Request). See also File No. 20120221ABD, granted March 8, 2012 (KRAL(AM) STA Extension Request granted until June 21, 2012); File No. BLESTA- 20120319AHV, granted April 18, 2012 (KIQZ(FM) STA Extension Request granted until June 21, 2012). According to Commission records, Station KRAL(AM) resumed operations on June 18, 2012, and Station KIQZ(FM) resumed operations on June 19, 2012, and then both stations went silent again on June 21, 2012. See File No. BLSTA-20120622ACM, granted September 24, 2012 (KRAL (AM) 2012 STA Request); File No. BLSTA - 20120622ACN, granted September 7, 2012 (KIQZ(FM) 2012 STA Request).

⁷ *MO&O*, 26 FCC Rcd at 12846-12847.

⁸ See *MO&O*, 26 FCC Rcd at 12847; see also *Forfeiture Order*, 25 FCC Rcd at 97-100.

⁹ *MO&O*, 26 FCC Rcd at 12847.

¹⁰ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80 (b)(4); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999).

¹¹ 47 U.S.C. § 503(b).

¹² H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant Section of the act (e.g., Section 503) As defined . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

Section 503's use of the term "willful" means the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law,¹⁴ and the term "repeated" means "the commission or omission of such act more than once or, if such commission is continuous, for more than one day."¹⁵

4. Mt. Rushmore presents three questions for review. It first asks whether a licensee's failure to make available quarterly radio issues/programs lists on one date constitutes a "repeated" or "intentional" violation of the Rules warranting a substantial monetary forfeiture.¹⁶ The failure of a licensee to make a complete public inspection file available during regular business hours is a violation of Section 73.3526 of the Rules and such failure may result in a monetary forfeiture to the licensee.¹⁷ Mt. Rushmore failed to make consecutive quarters of radio issues/programs lists – indeed more than nine consecutive quarterly radio issues/programs lists – available for inspection in the public inspection files for both Station KRAL(AM) and Station KIQZ(FM).¹⁸ We therefore affirm the finding that Mt. Rushmore's violation was repeated.

5. We also reject Mt. Rushmore's claim that imposition of a forfeiture was unwarranted because the stations' violations allegedly were not "intentional." As an initial matter, under Section 503(b) of the Act, the Commission need only demonstrate that the conduct at issue was "repeated" or "willful" to merit a forfeiture penalty. As discussed above, we have already established that the conduct was repeated, and therefore subject to forfeiture on that basis alone. But the conduct also can be said to be "willful" under Section 503(b) because Mt. Rushmore failed to take the actions in question (i.e., to maintain and produce for inspection, upon request, a complete public inspection file as required under Section 73.3526 of the Rules), irrespective of any intent to violate Section 73.3526. Indeed, at the time of the inspection, Mt. Rushmore knew its public inspection file was incomplete and advised the Denver Office agents accordingly.¹⁹ Moreover, to the extent Mt. Rushmore merely contests the forfeiture amount, we find that the amount assessed for violations at the two stations was consistent with the Commission's recent precedent.²⁰

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¹³ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶10 (2001) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage); *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (applying Section 312(f)(1) definition of "willful" to Section 503 forfeiture), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹⁴ 47 U.S.C. § 312(f)(1).

¹⁵ 47 U.S.C. § 312(f)(2).

¹⁶ Application for Review at 3–4.

¹⁷ See *Lazer Licenses, LLC*, Order on Review, 27 FCC Rcd 626 (2012) (the licensee of three co-located broadcast stations was liable for an \$8,000 forfeiture when an inspection revealed that the public inspection file of each station was missing six quarterly issues/programs lists on one day); *Twenty-One Sound Communications, Inc.*, Order on Review, 23 FCC Rcd 2436 (2008) (the licensee of a broadcast station was liable for a \$3,000 forfeiture when an inspection revealed that the station's public inspection file was missing the station's ownership report, license renewal, and renewal application).

¹⁸ *NAL* at para. 15. Compare *Twenty-One Sound Communications, Inc.*, 23 FCC Rcd at 2439 (an incomplete public inspection file, missing only three items, could subject a licensee to monetary forfeiture regardless of why or for how long the items were missing).

¹⁹ At the time of the inspection, the station's manager contacted the staff member responsible for the public inspection file several times during the inspection; however, the missing issues and programs lists could not be produced. *Forfeiture Order*, 25 FCC Rcd at 99.

²⁰ Mt. Rushmore contends that in other cases, forfeitures were not assessed for "single" violations of the public inspection file rules. Application for Review at 3–4. Specifically, admonishments were found to be appropriate where certain types of material were missing from the public inspection file. See *EZ New Orleans, Inc.*, Memorandum (continued . . .)

6. Second, Mt. Rushmore asserts that the Bureau failed to consider as mitigating factors the licensee's immediate correction of the violations and dismissal of the station employee responsible for the violations.²¹ As the Commission has stated in the past, however, a licensee is expected to correct errors when they are brought to the licensee's attention and such correction is not grounds for a downward adjustment in the forfeiture.²²

7. Finally, Mt. Rushmore asks that if stations "are failing financially to the point that they have been silent for most of the past year, would a substantial forfeiture be confiscatory in nature and out of line with other FCC monetary actions dealing with silent stations."²³ The Bureau considered Mt. Rushmore's financial status in the *MO&O*, but correctly concluded that it was unable to determine if a forfeiture reduction was appropriate because Mt. Rushmore had "provided no financial documentation of its overall operations to support its request for reduction of the forfeiture amount based on its inability to pay."²⁴ Mt. Rushmore has failed to make such a showing in its Application for Review. Instead, it continues to contend that it cannot do so because "it does not maintain separate tax records for each of its stations and, therefore, it [is] impossible to break down a financial statement to demonstrate that its two Rawlins stations [have] economic problems."²⁵ Such station-specific financial information is not necessary or appropriate for an ability to pay determination. The Commission has consistently interpreted its rules as requiring consideration of all financial resources available to a licensee, not just those attributable to the station or stations involved in the violations at issue.²⁶ As was made clear in the *MO&O*, in making such a determination, we require information about a licensee's *overall* financial resources, particularly one such as Mr. Rushmore, which holds a total of 11 radio station licenses.²⁷

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Opinion and Order, 15 FCC Rcd 7164 (1999) (admonishment appropriate where licensee failed to place listener complaint letters in its public inspection file); *Emmis Television License Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 22581 (Enf. Bur. 2004) (admonishment appropriate where public complaint letters were missing from a station's public inspection file). Cancellation of a forfeiture was found to be appropriate where a licensee could show a public inspection file did exist and was missing from a main studio for one day. See *Jamie Patrick Broadcasting, Ltd.*, Memorandum Opinion and Order, 17 FCC Rcd 26277 (Enf. Bur. 2002) (forfeiture cancelled where licensee was able to certify that it always maintained a public inspection file and it was missing from the station's main studio for just one day). But see *L.R. Radio Group, Inc.*, Forfeiture Order, 27 FCC Rcd 11260 (Enf. Bur. 2012) (imposing forfeiture for missing public inspection file despite licensee's claim that file existed but was misplaced during FCC agent's inspection; "even if the lists existed at the time of the inspection, the licensee must make the public inspection file available; it is not the agent's responsibility to search the station to locate the station's public inspection file"). We believe that Mt. Rushmore's public inspection file violations are not comparable to the cases it cites -- the violations were more serious in terms of both the missing materials and the period covered, involved two stations, and Mt. Rushmore made no effort to produce the missing materials at any time after the inspection, or to show that they had ever been compiled.

²¹ Application for Review at 3, 4–5. We note that, contrary to Mt. Rushmore's assertions, it did not immediately correct all the violations in this proceeding. See, e.g., *Forfeiture Order*, 25 FCC Rcd at 100 (ordering Mt. Rushmore to comply with the Denver Office's directive in the *NAL* to report on its efforts to bring the Station WHB734 license into compliance).

²² *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871-76 (2002).

²³ Application for Review at 3, 5–6.

²⁴ *MO&O*, 26 FCC Rcd at 12847.

²⁵ Application for Review at 5.

²⁶ See *SM Radio, Inc.*, Order on Review, 23 FCC Rcd 2429, 2431-2434 (2008).

²⁷ See Mt. Rushmore's most recent FCC 323 Ownership Report for Commercial Broadcast Stations, File No. BOA-20111201CEQ, dated December 1, 2011.

Moreover, the operating status of its two Rawlins stations is not probative to this determination.²⁸ Therefore, upon review of the Application for Review and the entire record herein, we deny Mt. Rushmore's Application for Review and affirm the Bureau's *MO&O*.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.115(g) of the Commission's Rules,²⁹ that the Application for Review filed by Mt. Rushmore Broadcasting, Inc. **IS DENIED** and the *Memorandum Opinion and Order* **IS AFFIRMED**.

9. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within fifteen (15) calendar days after the release date of this *Order on Review*.³⁰ On April 4, 2013, the United States filed a complaint in federal district court against Mt. Rushmore Broadcasting, Inc., for recovery of the \$17,500 monetary forfeiture penalty, in *U.S. v. Mt. Rushmore Broadcasting, Inc.*, No. 2:13-cv-00079 (D. Wyo.). If timely payment of the forfeiture is received, the government will dismiss the district court case. Mt. Rushmore Broadcasting, Inc., shall send electronic notification of payment to WR-Response@fcc.gov and to Mark A. Klaassen, Assistant United States Attorney, at mark.klaassen@usdoj.gov, on the date said payment is made.

10. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.³¹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure

²⁸ Mt. Rushmore's citation of the Commission's policy of waiving the obligation of stations that are dark or silent from paying annual regulatory fees is inapposite to the situation where, as here, the issue is the obligation of a licensee to satisfy a forfeiture obligation due to its violation of the Commission's rules. Application for Review at 6. The Commission has determined that it will grant petitions for waiver of regulatory fees on grounds of financial hardship from licensees of broadcast stations which are dark because "[p]etitions to go dark are generally based on financial hardship . . . [and] [u]nder these circumstances, imposition of the regulatory fees could be an impediment to the restoration of broadcast service" *Implementation of Section 9 of the Communications Act*, Memorandum Opinion and Order, 10 FCC Rcd 12759, 12762 (1995). The Commission has announced no such general policy regarding inability to pay claims by licensees that have been found to have violated the Commission's rules. In those cases, and as explained in the *MO&O*, a licensee may also succeed in having its forfeiture reduced or cancelled, but it must provide specific financial documentation to justify its inability to pay claim. Mt. Rushmore has not supplied such documentation in this proceeding.

²⁹ 47 C.F.R. § 1.115(g).

³⁰ 47 C.F.R. § 1.80.

³¹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.

- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

11. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³² If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

12. **IT IS FURTHER ORDERED** that this *Order on Review* shall be sent by both Certified Mail, Return Receipt Requested, and regular mail to Mt. Rushmore Broadcasting, Inc., at 218 N. Wolcott Street, Casper, Wyoming 82601-1923, and Lee J. Peltzman, Shainis & Peltzman, Chartered, 1850 M Street, N.W., Suite 240, Washington, D.C. 20036, its counsel of record.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³² See 47 C.F.R. § 1.1914.